NO. 82-6108

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GARY X. NELSON,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

NICHOLAS G. DUNICH
Assistant Attorney General
132 State Judicial Bldg.
40 Capitol Square S. W.
Atlanta, Georgia 30334
(404) 656-3499

QUESTION PRESENTED

Whether the Georgia Supreme Court properly concluded that under the facts of this case there was sufficient circumstantial evidence to support the Petitioner's convictions beyond a reasonable doubt?

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PART ONE

STATEMENT OF THE CASE

On October 3, 1979, the Chatham County Grand Jury returned indictments against Petitioner Gary X. Nelson for the February 19, 1978 murder, aggravated sodomy and rape of Valerie Armstrong, a six year old child. (R. 7-9). Petitioner was tried on February 27-29, 1980, and convictions were obtained by the state on all three charges. (T. 670). The jury returned a recommendation for the death penalty, finding a statutory aggravating circumstance under O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7), to wit: the murder of Valerie Armstrong had been outrageously or wantonly vile, horrible and inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim. Petitioner received consecutive life sentences following his convictions for aggravated sodomy and rape. (T. 680-681).

Petitioner's convictions and sentences were affirmed by the Georgia Supreme Court on direct appeal, and his initial petition for writ of certiorari to this Court was denied. Nelson v. State. 247 Ga. 172, 274 S.E.2d 317 (1981), cert. denied, 454 U.S. 882 (1981). (See Petitioner's Exhibit A).

Following the affirmance of Petitioner's convictions and sentences on direct appeal and the denial of certiorari by this Court, Petitioner filed an application for state habeas corpus relief in the Superior Court of Butts County, Georgia. By agreement of counsel, only one of the twenty-two issues presented to the Butts county court was initially considered. This issue pertained to the sufficiency of the evidence and whether or not the Petitioner had been denied due process because the Georgia Supreme Court, in its original review of Petitioner's case on direct appeal, had considered evidence not actually in the record. The state habeas court found that the Georgia Supreme Court had mistakenly considered information

which had not been placed into evidence and as a result thereof, the habeas court granted relief, finding the evidence insufficient as a matter of law. Nelson v. Zant, Case No. 5387 (Butts County Superior Court, June 8, 1981). (See Petitioner's Exhibit B).

The Respondent then appealed the decision of the Butts County Superior Court to the Georgia Supreme Court. The Georgia Supreme Court, in its second review of the Petitioner's case, admitted that on direct appeal it had erroneously considered the results of certain tests comparing a hair found on the victim with a known sample from Petitioner's former roommate, Alphonso Swinton. This test was not actually admitted into evidence at Petitioner's trial. Zant v. Nelson, 250 Ga. 152, 153, 296 S.E.2d 590 (1982).

The Georgia Supreme Court then reevaluated the sufficiency of the evidence, excluding the evidence pertaining to the particular hair sample comparison. Even excluding this information, the Georgia Supreme Court still concluded that the circumstantial evidence was sufficient to support Petitioner's convictions beyond a reasonable doubt. Zant v. Nelson, supra, at 154-155. The Georgia Supreme Court's decision was rendered on October 28, 1982. (See Petitioner's Exhibit C). Thereafter, this instant petition for a writ of certiorari was filed under 28 U.S.C. § 1257(3) seeking review of the Georgia Supreme Court's decision in Zant v. Nelson, supra.

PART TWO

STATEMENT OF THE FACTS

The victim in this case, Valerie Armstrong, was a six year old child who resided with her mother and stepfather in Savannah, Georgia. (T. 197, 203-204, 208). Petitioner was a neighbor and knew Valerie as one of the neighborhood children who ran errands for the tenants in his building. (T. 180-181, 184, 204-205).

On the morning of Sunday, February 19, 1978, Petitioner began working on an automobile which was located behind his residence. At approximately ten o'clock that morning Petitioner visited Valerie's home in order to borrow a tool to work on the automobile. He and Valerie's stepfather talked for some time, and then her stepfather agreed to assist Petitioner with his automobile repairs. (T. 180, 204-205, 432, 565-568). At approximately 5:30 p.m. on February 19th Petitioner completed the initial work on the car with the help of Valerie's stepfather. (T. 182-183). Petitioner and Valerie's stepfather then returned to the victim's home where they again conversed for awhile. Before Petitioner left Valerie's house her stepfather pointed her out while she was playing outside with some neighborhood children. Petitioner responded, "Yeah, I know, that's my little buddy, because she comes down to the house all the time to go the store for us." (T. 284).

Petitioner then returned to his house to continue to work on his automobile. Finding insufficient light for his work, he ignited a fire by which to see. (T. 436-437, 483, 486). The victim's stepfather noticed that Petitioner had started the fire and sent his son, Michael, to Petitioner's house to inquire as to whether Petitioner wanted to use his drop cord light. (T. 185, 218, 221). When Michael received no answer after knocking on Petitioner's front door he went to the backyard of the house, but Petitioner was not to be found. (T. 221).

By 7:00 o'clock p.m. young Valerie had not returned home. Her concerned stepfather organized his other children and scouted the neighborhood looking for her, but she could not be located. (T. 186).

The person who testified as to the last sighting of Valerie Armstrong on February 19, 1978, was Sabrina Williams, a playmate of Valerie's. At the time of trial Sabrina was ten years old (T. 297). Sabrina last saw Valerie just before dusk. Sabrina stated that she and Valerie had been playing and then had gone to the store. As they were returning from the store, Valerie said that she was going to her "uncle's" house. (T. 302-304, 308). According to Sabrina, Valerie then walked toward the backyard of Petitioner's house. As Valerie and Sabrina parted company at Petitioner's house, Sabrina noticed Petitioner Nelson working on his blue Volkswagen automobile in the yard. (T. 305-306, 311-314).

Fredericka Armstrong, Valerie's sister, came to Sabrina Williams' house to inquire about Valerie's whereabouts. Unfortunately, Sabrina did not think it important enough to tell her sister that they had been to the store, and that Valerie had stopped at Petitioner's house on the way back. (T. 308-311). As a result of Valerie's family being unable to locate her, a missing persons report was filed with the Chatham County Police Department. (T. 186-187, 228-229). An initial police search of the nearby swampy wooded area in th vicinity of the victim's neighborhood conducted during the evening of February 19, 1978, proved to be unproductive. (T. 231-232). However, at approximately 3:00 o'clock p.m., on February 20, 1978, the police finally located the body of Valerie Armstrong. (T. 233).

When Valerie's body was found, her clothes were disarrayed, the slip she was wearing protruded outside her partially zipped pants, and there was evidence that she had been stabbed to death. A broken knife handle wrapped in masking tape and a knife blade were found near the body. There were also blood

spots between the body and a nearby ditch, as well as blood spots on a leaf of a nearby tree. (T. 233, 235, 243, 245-248, 379).

The autopsy which was later performed on Valerie Armstrong established that the child had been horribly attacked. (T. 294-296). Her vagina and rectum were severly bruised, there was heavy bleeding and both the vagina and rectum area were widely stretched. The skin between the vagina and rectum was torn, the victim's lips were also torn, and there was a mixture of seminal fluid and blood found in the anus and the victim's vagina. (T. 291-295). The pathologist gave his medical opinion that Valerie Armstrong had been brutally raped, anally sodomized, and probably orally sodomized. (T. 294-296). The pathologist's examination of Valerie's body also revealed bruises around the neck and multiple, superficial, shallow stab wounds on the right side of the chest. (T. 293). These shallow stab wounds were indicative of someone stabbing the victim lightly, either before or after the fatal stab wound in the left side of the chest. (T. 293, 295). Evidence showed that a stab wound to the left chest and lung caused Valerie to bleed to death, the death taking approximately thirty minutes to ensue. (T. 293-295).

Two days after Valerie's disappearance her stepfather received an early morning telephone call from the Petitioner during which he stated, "Yeah man, I know who killed your daughter," When Valerie's stepfather inquired of him as to how he knew who had killed his daughter, Petitioner said that it had been a fellow on the east side by the name of Blue. Petitioner then stated, "I can't tell you no more, cause I don't want to get involved." He then hung up the phone and the victim's stepfather thereafter reported the phone conversation to the police. (T. 188-190, 391-391). The police investigation of this lead revealed that the person nicknamed "Blue" was not a viable suspect. (T. 391-391)

During their investigation the police talked with Sabrina Williams and learned that Valerie had last been seen going into the backyard of the Petitioner's house. Three days after Valerie's disappearance Sabrina identified Petitioner from a photographic lineup as being the individual she had seen with Valerie shortly before Valerie's disappearance. (T. 312-315, 325-330). Included in the picture lineup was a photograph of Petitioner's former roommate Alphonso Swinton. (T. 282).

Petitioner Nelson apparently learned that he was a prime suspect in the disappearance and killing of Valerie Armstrong, and he voluntarily went to the police station. Even prior to being advised of his rights, he made certain contradictory statements which suggested a defense of alibi. (T. 423-507). He also consented to giving blood and hair samples. (T. 476-477). Petitioner's hair sample was later determined to be similar to a hair sample found in the victim's vagina. (T. 339-342). Petitioner's blood type (Type O) matched the typing of the seminal fluid stains found on the victim. (T. 363-365).

Petitioner repeatedly denied ownership of the knife found near Valerie's body, but this testimony was refuted by Patricia Brown, a female acquaintance of Petitioner's, and former girlfriend of Alphonso Swinton. (T. 346-350, 355-356, 493). Specifically recalling the taped handle, she positively identified the knife as the one she had used to cut chicken when she went to Petitioner's house to cook for him. (T. 346-350, 353-356).

Contradictory testimony was given by Petitioner's girlfriend, Diane Knight. Ms. Knight testified that the knife found near the victim's body was not the knife which belonged to the Petitioner. (T. 524-528). However, the State in rebuttal called a police sergeant who testified that he had several conversations with Ms. Knight concerning this case. He testified that in those conversations Ms. Knight told him the following things. First, she stated that she had seen the

knife in question at the Petitioner's home. (T. 604). Second, she told the police officer that in a conversation she had with the Petitioner, he had told her not to identify the pictures of the knife the police would show her. She stated that she asked Petitioner "Why?", but he would not answer that question. (T. 603, 607). Finally she told the police officer that she had been with Petitioner Nelson all day on February 19, 1978 (T. 619-610).

Petitioner, in his testimony, stated that at approximately 7:00 o'clock p.m., when it became dark while he was working on his automobile in his backyard, he left his house and rode a bus to the home of Dennis Lonon. (T. 571). Petitioner denied ever having seen the victim on February 19, 1978. (T. 570-52). He stated that after he returned from Lonon's house he continued to work on his car, and then went to a local convenience store looking for a person who owed him some money. (T. 572-576-577). Petitioner denied ever seeing the knife found near the victim's body. (T. 574-575). He also denied having any conversation with Valerie's stepfather, as well as denying any knowledge or implication in the killing of Valerie Armstrong. (T. 580-581).

Additional facts as necessary for a more complete discussion of the issue presented will be recited during the following portion of this brief.

PART THREE

REASON FOR NOT GRANTING THE WRIT

THE STANDARD OF PROOF NECESSARILY REQUIRED TO SUPPORT A CRIMINAL CONVICTION IS WELL ESTABLISHED, AND SAID STANDARD HAS BEEN MET IN THE PETITIONER'S CASE.

Petitioner's argument essentially asserts that the writ of certiorari should be granted in this case to review the

sufficiency of the evidence supporting Petitioner's convictions for the murder, aggravaged sodomy, and rape of a six year old child. Of course, it has long been held that the Constitution requires that in a criminal case, guilt of an accused must be established by proof beyond a reasonable doubt. See Miles v. United States, 103 U.S. 304 (1881); Holt v. United States, 218 U.S. 245 (1910); Leland v. Oregon, 343 U.S. 790 (1952); In Re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979).

In Holland v. United States, 348 U.S. 121 (1954), this Court expounded that the same standard of appellate review should be applied both to circumstantial and direct evidence cases. (Id. at 139-140.) When the evidence is viewed in a light most favorable to the government, it must be sufficient to convince a reasonable trier of fact that the evidence establishes the defendant's guilt beyond a reasonable doubt. Glasser v. United States, 315 U.S. 60 (1942); Jackson v. Virginia, supra; United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982).

However, while following the aforesaid, the State of Georgia also imposes an additional requirement in circumstantial evidence cases. Not only must the evidence be sufficient to establish the defendant's guilt beyond a reasonable doubt, but also, "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothsis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." O.C.G.A. § 24-4-6; Ga. Code Ann. § 38-109; Nelson v. State, supra, 247 Ga. at 177; Holt v. State, 247 Ga. 648, 650, 278 S.E.2d 390 (1981); Jones v. State, 247 Ga. 268, 269, 257 S.E.2d 67 (1981). Under Georgia law it is not necessary for the State to prove that it was impossible for the offense to have been committed by anyone else or that it might not by bare possibility have been done by another. Pinson v. State, 235 Ga. 188, 190, 219 S.E.2d 125 (1975); McConnell v. State, 235

Ga. 366, 220 S.E.2d 5 (1975). The term hypothesis as used in O.C.G.A. § 24-4-6; Ga. Code Ann. § 38-109 simply refers "to such reasonable inferences as are ordinarily drawn by ordinary men in light of their experience in every day life." Wrisper v. State, 193 Ga. 157, 164, 17 S.E.2d 714 (1941).

Petitioner's case does not present a unique question of law or even a situation where the Georgia Supreme Court has deviated from its prior rulings or from established federal constitutional standards. At most, this case presents a question of whether the Georgia Supreme Court reached the proper conclusion upon applying the aforesaid standards to the particular facts of this case. In light of the available, alternative means for examining this issue by way of federal habeas corpus, Respondent respectfully submits that the extraordinary remedy of the writ of certiorari is neither justified nor warranted.

Alternatively, Respondent's position in opposition to the writ is further supported by a review of the evidence. Of course, as noted previously, the evidence must be viewed in a light most favorable to the state. Jackson v. Virginia, supra. Petitioner stresses the error made by the Georgia Supreme Court in its initial consideration of the sufficiency of the evidence in Nelson v. State, supra. Although he argues that in its initial opinion the Georgia Supreme Court found that the omitted hair comparison was necessary to exclude Petitioner's roommate, Alphonso Swinton, as a possible suspect, and thus was necessary to support Petitioner's conviction beyond a reasonable doubt; this was not the interpretation that the Georgia Supreme Court gave to its previous ruling. See Zant v. Nelson, supra, 250 Ga. at 153-154. The Georgia Supreme Court specifically stated in Zant v. Nelson that its prior opinion in Nelson v. State, merely said that it was necessary for the State to exclude the hypothesis that Swinton committed the crime in order to carry its burden in the case. A proposition which was recognized by the State at trial. The

court in Zant v. Nelson held that its prior opinion did not state that the hair sample evidence was necessary to exclude the hypothesis that Alphonso Swinton committed the crime. It merely stated that the evidence was relevant. Zant v. Nelson, supra, at 154. The court then reevaluated the evidence to determine its sufficiency. Id.

The evidence in this case shows the following relevant circumstances. The last time the victim was seen alive she was located at Petitioner's residence at a time when the Petitioner was also present. (T. 305-306, 311-314). The victim was known to the Petitioner and often ran errands for him. (T. 184). No one other than the Petitioner lived at the residence on February 19, 1978, the day the victim disappeared. Specifically, Petitioner's former roommate, Alphonso Swinton, had moved from that residence five weeks earlier. (T. 426, 573-574). In fact, Petitioner stated that Swinton had not even been by his former residence for at least two or three weeks prior to the murder of Valerie Armstrong. (T. 427). There was no evidence whatsoever that Swinton was at or near the residence on February 19, 1978. Sabrina Williams, the last person to see Valerie Armstrong alive, saw only the Petitioner. (T. 305-306, 311-314). A photograph of Swinton was included in the photographic lineup from which Sabrina Williams ultimately picked out the Petitioner. (T. 282). Although Petitioner has offered the alternative hypothesis that perhaps Swinton committed the murder, it is clear that the jury found that hypothesis was unreasonable and unjustified.

Additionally, the murder weapon was identified as coming from the Petitioner's home. (T. 346-350, 353-356, 604). Petitioner had told at least one witness not to identify the pictures of the knife that the police would show to the witness, and he would not explain why he wanted her to lie. (T. 603, 607). Petitioner's blood type matched the type of the seminal fluid stains found on the victim, (T. 363-365), and a hair sample found in the victim's vagina area was similar to

a known hair sample from the Petitioner. (T. 339-342). There was also testimony that the Petitioner called the victim's stepfather and attempted to throw suspicion upon another individual whom, as later investigation revealed, was not a viable suspect. (T. 188-190, 391-391).

In conclusion, Respondent submits that when the totality of the evidence is viewed in a light most favorable to the state, it amply demonstrates Petitioner's guilt beyond a reasonable doubt so as to comply with constituional standards. Thus, this Court should find no merit to Appellant's argument urging issuance of the writ in this case.

CONCLUSION

For all of the above and foregoing reasons, it is respectfully submitted that the petition for writ of certiorari in the present case should be denied.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant Attorney General

Marion O. Gordon
MARION O. GORDON
First Assistant Attorney General

William B. Hill, Jr.
WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Nicholas G. Dumich
NICHOLAS G. DUMICH
Assistant Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3499

CERTIFICATE OF SERVICE

I, NICHOLAS G. DUMICH, attorney of record for the Respondent, certify that I am a member of the Bar of the Supreme Court of the United States, and that in accordance with the Rules of the Supreme Court of the United States, I have this day served counsel for the Petitioner with a true and correct copy of this Brief for the Respondent in Opposition, by depositing a copy of same in the United States Mail, with adequate postage attached thereon and properly addressed to:

Mr. Richard H. Sayler
Attorney at Law
Donevan, Leisure, Newton & Irvine
30 Rockefeller Plaza
New York, New York 10112

Honorable Spencer Lawton
District Attorney
Eastern Judicial Circuit
400 Chatham County Courthouse
133 Montogmery St.
Savannah, Georgia 31402

This 4th day of March, 1983.

NICHOLAS G. DUMICH